STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Judges: Wilder, P.J., and Holbrook, Jr. and McDonald, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

Supreme Court
No. 118351

Court of Appeals
No. 219499

-vs-

JESSIE B. JOHNSON,

Lower Court
No. 92-115814-FH

Defendant-Appellee.
_____/

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

ROBYN B. FRANKEL (P43629)
Attorney for Defendant-Appellee

DEFENDANT-APPELLEE'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

PROOF OF SERVICE

ROBYN B. FRANKEL (P43629)
Attorney for Defendant-Appellant
39520 Woodward, Suite 230
Bloomfield Hilis, Michigan 48340
(248) 645-1400

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee accepts the jurisdictional statement of the Plaintiff-Appellant.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT ADHERE TO THE ENTRAPMENT TEST WHICH HAS DEVELOPED UNDER MICHIGAN LAW RATHER THAN OVERRULE THOSE PREVIOUS DECISIONS AND ADOPT THE FEDERAL ENTRAPMENT TEST?

The Court of Appeals *did not* answer this question.
The trial court did not answer this question.
Defendant answers "Yes."
Prosecution answers "Yes."

II. DID THE LOWER COURTS PROPERLY RULE THAT DEFENDANT WAS ENTRAPPED?

The Court of Appeals answered "Yes."
The trial court answered "Yes."
Defendant answers "Yes."
Prosecution answers "No."

STATEMENT OF FACTS

Defendant Jessie Johnson was charged with two counts of possession with the intent to deliver between 225 and 650 grams of cocaine.[1] He entered pleas of guilty pursuant to a sentence agreement with the trial court which provided that the court would depart from the 20 to 30 year mandatory minimum sentence, and not sentence Defendant to a term of incarceration in excess of 5 to 20 years[2]. Defendant was subsequently sentenced under the terms of that agreement to two consecutive terms of 5 to 30 years imprisonment. The prosecution appealed the sentence, first to this Court which declined to hear the matter, and then to the Supreme Court - which remanded the case to this Court with instructions to hear it as if on leave granted. This Court subsequently issued an opinion vacating Defendant's sentence and remanding the case to the trial court for resentencing. *People v Johnson,* 223 Mich App 170 (1997) (37a-40a).

On remand, Defendant Johnson withdrew his pleas of guilty and moved for a dismissal on grounds of entrapment. A hearing was held before the trial judge in June and July 1998.

Michigan State Police Lieutenant Gregory Sykes testified that, while working in an undercover capacity, an informant - Lemeul Flack - introduced him to Defendant Jessie Johnson (59a). Lt. Sykes was introduced to Defendant as Gregory Johnson - a narcotics distributer in the area with an interest in obtaining Defendant's assistance in the drug trade (61a, 86a). Lt. Sykes offered to pay Defendant in exchange for his protection, to provision of information regarding drug

---

1 *MCL 333.7401(2)(a)(ii).*

2 This sentence agreement was entered pursuant to *People v Cobbs*, 443 Mich 276 (1993).

raids, and assistance in ensuring that his narcotics shipments were not stolen or otherwise seized (61a-62a). He told Defendant that there was a lot of money to be made (61a 62a, 84a).

During the subsequent two months, Defendant never offered to obtain narcotics for the undercover officer, nor did he ever offer narcotics for sale, or purchase drugs from the officer, or make any offers to set up the officer with other purchasers (63a). The officer testified that there were *only two occasions on which Defendant did indeed possess narcotics - those being the incidents* forming the basis of the charges herein (64a). The first of these occasions was on February 7, 1992, at which time the officer contacted Defendant to accompany him to a package pickup (64a). Defendant followed the officer to a shopping center parking lot (65a). At this location, the undercover officer met up with a second undercover officer who handed a package of drugs to Lt. Sykes (65a). Lt. Sykes called Defendant over to him and gave him the package (66a).

Lt. Sykes testified that he "called" Defendant over because Defendant's job was to protect both Sykes and the drugs from police detection, and Defendant could not have performed that duty from where he was standing some 15 feet away (66a, 73a). Lt. Sykes testified that he called Defendant over and then handed him the package of narcotics (66a). He testified that there was no previous discussion about Defendant's need to take any possession of the narcotics, and that it was only during the actual transaction that the officer called Defendant to come over to him and then handed him the narcotics and told him that it was his job to ""check the drugs in the bag" (76a). Lt. Sykes subsequently paid Defendant $1000.00 (66a-67a, 94a). The package contained 280 grams of cocaine - a predetermined amount (72a, 108a). The second transaction occurred on March 4, 1997, and involved in excess of 470 grams of cocaine (TI 96a, 97a, 109a). The officer was aware that the mandatory minimum penalty was 20 years in prison (110a). Prior to the second occasion, the officer

inquired of Defendant if he wanted to "get out" and that Defendant answered negatively (96a). The officer denied that he had set up the phony drug transaction in order to allow Defendant to participate (112a). He testified that Defendant was already willing to participate and that the officer merely provided the drugs (112a). Lt. Sykes further testified that he set up the second transaction to confirm that Defendant had not entered into the first transaction just to get some quick money, but to establish that Defendant was actually involved with trafficking (115a). The officer also testified that had Defendant declined to participate beyond the first transaction, that he still would have been arrested and charged (119a).

Lt. Sykes testified that prior to his contacts wit Defendant, that he had understood that Defendant was involved in crack houses in the Pontiac area and that the informant - Lemuel Flack - was working for Defendant (88a). Flack had advised that he owed Defendant a debt from the sale of crack out of Defendant's house (88a). The officer could not confirm whether the debt was actually a drug debt or simply back rent owed to Defendant (100a-101a). Neither was the officer able to confirm or provide any corroboration for Flack's allegations that Defendant Johnson had been involved in the narcotics business in Pontiac (102a).

Michigan State Police Detective Lieutenant Lew Langham testified that he was the officer-in-charge of investigating Jessie Johnson (104a). He determined the amounts of cocaine for the narcotics deliveries and the amounts to be paid to Defendant (104a-105a). Lt. Langham testified that he never personally observed Defendant in possession of narcotics (105a). Nor did he have any personal knowledge that Defendant was involved with running drug houses, but had merely been "told" that Defendant was running a crack house in Pontiac (106a).

Pontiac Police Department Captain Patrick McFalda testified that in January 1992 he was in charge of the vice crew at the Pontiac Police Department and was contacted by the department regarding Lemuel Flack - who was interested in providing information about a Pontiac Police Officer who was selling narcotics (124a). Flack advised the officer that Defendant Jessie Johnson - a Pontiac Police Officer - owned a house in the City of Pontiac and that Flack was selling drugs out of the house with Defendant's "full knowledge and consent and more or less participation; not in the actual sale, but in setting it up and providing protection and in running the operation." (126a, 133a). Defendant was not supplying Flack with narcotics (126a). In fact, the officer testified that Flack had stated that he was being supplied with narcotics from two other individuals (127a-128a). Flack was afraid of these suppliers because someone had stolen the narcotics from the house, and Flack was ultimately responsible for payment to the suppliers (128a). Defendant had never done anything to injure Flack (129a).

The officer acknowledged that at the time that Flack provided all of the above information, there was no corroboration of the statements (130a). Subsequently, the officer confirmed that Defendant did own the house at issue, and the officer opined that the house was a dope house (131a). Defendant did not reside at the home, but he did own it (135a). Flack was renting the residence (136a). Flack also insisted that he was not merely paying rent to Defendant, but was paying to be permitted to sell narcotics out of the house (143a). Later the officer found additional confirmation wherein Defendant accepted money and the VCR from Flack (131a). The officer also testified to taped telephone conversations between Flack and Defendant (138a-139a).

Leon Flack testified that he was Lemuel Flack's brother and that Lemeul had gone o high school with Defendant Jessie Johnson (151a). Leon flack testified that in late 1991, he was living

at Defendant's rental house in Pontiac and that in exchange for allowing him to reside there, Leon Flack assisted with construction work at the house (151a, 155a). Lemeul began living there as well once he was released from the Penitentiary (151a-152a). Leon Flack knew that his brother was using drugs during that time period, but he was not aware that Lemeul was selling narcotics from the house (152a). Lemeul was making a living by occasional work, shoplifting, and breaking and entering the homes of others (152a). The witness laughed when questioned as to whether he knew that Defendant was setting up drug houses (152a). He stated that while Defendant was aware of Lemeul's criminal history, that Defendant was rarely at the Pontiac residence (156a).

No additional witnesses were presented and the matter was taken under advisement. On April 19, 1999, the trial court issued an "Opinion and Order Granting Defendant's Motion to Dismiss" (34a). The trial court ruled that Defendant had met his burden of establishing entrapment under both of the recognized theories underlying such a defense.

The trial court held that the police engaged in impermissible conduct that would have indued a person similarly situated to Defendant to commit the crime. The court noted that there was no evidence that Defendant had ever bought, sold or possessed narcotics prior to the incidents herein and that the police had devised a plan to apprehend Defendant after an informant told the police that he was a tenant in a house owned by Defendant, and that Defendant was permitting him to sell drugs from the house. The trial court noted that Defendant was "hired" to provide protection to an identified narcotics dealer for $1,000.00, but that his level of involvement was escalated by the police when, during the transaction, the undercover officer gave the narcotics to Defendant to hold. This, the court noted, "took Defendant to a completely different level of involvement." The court ruled that this change in participation which was created by the police was unacceptable:

> "Defendant was no longer accepting money for passively allowing others to participate in drug transactions, the conduct for which he was known. He was not simply protecting a purported criminal from arrest or providing information to avoid arrest, i.e. , actively permitting other [sic] to conduct drug transactions. His involvement was suddenly escalated to actively possessing the drugs. This was no longer simply a form of bribery but instead a new crime and the only crime with which he was actually charged -- possession of a controlled substance." (35a).

The court also found that Defendant had met his burden of establishing entrapment on the basis of reprehensible police conduct:

> "In short, there was basis for suspicion that Defendant accepted bribes. In investigating this suspicion, it was not discovered that Defendant ever possessed or sold drugs. The police, however, manipulated Defendant and his willingness to accept bribes to create a new crime, the brief possessing of drugs." (36a).

From this Order, the prosecution filed an appeal. On December 19, 2000, the Court of appeals affirmed the trial court ruling in a Per Curiam opinion (37a). Judge Wilder dissented from the majority (41A-44a). The majority held that the police conduct in this matter was improper is that they escalated Defendant's conduct from owning a drug house to possession with the intent to deliver cocaine (39a). Although the undercover officer had originally hired Defendant in order to protect him from theft, and to advise him of pending drug raids, the office - unannounced - handed Defendant a package of cocaine at the first staged drug buy (39a). This action, the majority held, escalated Defendant's conduct from that of "passive involvement in the enterprise to active participation beyond the scope of what defendant had agreed to beforehand and pressured defendant into complying with Sykes' requests in order to remain a part of the enterprise." (39a). The majority also found that the promise of $50,000.00 also served as an excessive inducement for defendant to become involved with the operation. In conclusion, the majority held:

> "Sykes' actions in escalating defendant's conduct without defendant's prior knowledge were reprehensible and beyond the scope of what defendant had previously agreed to perform. This is especially true considering the extremely large amount of money at stake. The excessive amount of money involved, coupled wit Sykes' reprehensible conduct in escalating defendant's passive activity into active drug trafficking, was sufficient to establish entrapment." (40a).

From this opinion, the prosecution filed an application requesting leave to appeal. This Court granted leave and requested that the parties address the issue of whether this Court ought to adopt the federal test for entrapment (46a). Defendant-Appellee now files the instant Brief on Appeal.

ARGUMENTS

I. THIS COURT SHOULD ADHERE TO THE ENTRAPMENT TEST WHICH HAS DEVELOPED UNDER MICHIGAN LAW RATHER THAN OVERRULE THOSE PREVIOUS DECISIONS AND ADOPT THE FEDERAL ENTRAPMENT TEST.

This Court has directed the parties to brief the issue as to whether the Michigan objective test for entrapment ought to be abandoned in favor of the federal subjective test. These two tests represent the differing approaches to entrapment analysis. The "objective" test - historically accepted in Michigan - focuses primarily on the conduct of the government, and prohibits convictions where governmental conduct is objectively viewed as having instigated or created the charged offense. Alternatively, the "subjective" test - applied by the federal jurisdictions - focuses primarily on the predisposition of a defendant to commit the charged offense.

This is not the first time that this Court has inquired into the appropriate entrapment analysis. In *People v Jamieson,* 436 Mich 61, (1990), decided some twelve years ago, this Court undertook a re-examination of Michigan's entrapment law. In *Jamieson*, as in this case, the Court directed the parties to brief the issue of whether the Court should abandon the objective entrapment test in favor of the subjective test. Upon review, the *Jamieson* Court "concluded that there is not sufficient justification or need to change a well-settled principle of law in this state." *Id* at 65. Thus, the Court chose to maintain adherence to the objective entrapment test developed under Michigan law.[3]

---

[3] Subsequently, this Court granted leave to appeal in *People v Maffett*, 462 Mich 919 (2000), but after the matter was briefed and argued, the Court vacated the granting of leave to appeal. *People v Maffett*, 464 Mich 878 (2001). Justice Corrigan filed a dissent from the latter Order, indicating her preference to decide the issue on the merits. Justice Corrigan embarked on a detailed historical review of entrapment law at both the federal and state levels and concluded that the defense ought to be abrogated as it is without a valid legal foundation. *Id* at 894.

Defendant contends that the reasoning applied in the *Jamieson* decision remains valid today, and this Court ought to arrive at a similar conclusion herein.

Both the Appellant (Oakland County Prosecutor) and Amicus (Attorney General) have filed briefs which include historical reviews of the defense of entrapment under both federal and state law, and the distinctions between the objective test applied in Michigan and the alternative subjective test utilized in federal jurisdictions. Additionally, this Court recently reviewed the development of these principles in *People v Maffett,* 464 Mich 878 (2000) (vacating leave granted). In dissenting from the vacation of leave granted therein, Justice Corrigan embarked upon an exhaustive and thorough review of the historical development of federal and state entrapment analysis, and the distinctions between the objective and subjective tests for entrapment. Thus, Defendant will forgo a review and repetition of that information herein.

Ultimately, Defendant agrees with Appellant, and with Amicus, that the earlier Michigan cases were rightly decided and should continue to represent the state of the law in Michigan. Defendant's disagreement with those parties comes in two distinct areas. First, both Appellant and Amicus note that while they agree that the objective standard of analysis ought to remain law in Michigan, they also agree with Justice Corrigan that the defense ought to be abrogated as it has no legitimate legal foundation. Second, Appellant and Amicus argue that this Court ought to delete the portion of the Michigan entrapment test that prohibits convictions on the basis of "reprehensible" police conduct without reference to a defendant's specific individual characteristics.

As a preliminary matter to considering whether the federal test represents a "better" test to analyze claims of entrapment, this Court must confront the reality that to redefine entrapment

analysis in Michigan would necessitate the overruling of existing precedent. Thus, the Court must consider the principles of stare decisis.

A. Stare Decisis

Stare decisis represents the principle that a court ought to adhere to, or abide by, decided cases. *Robinson v City of Detroit*, 462 Mich 439, 463 n 20 (2000). Stare decisis is generally the "'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id* at 463, *quoting Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). The underlying theory is that principles of law which have been deliberately examined and decided by a court of "competent jurisdiction become precedent which should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79 (1990); *People v Kazmierczak*, 461 Mich 411, 425 (2000).

Certainly, Defendant recognizes that stare decisis is a principle which inherently requires flexibility. The doctrine does not require the sort of strict adherence that would cause the continued perpetration of error. It is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions. See *People v Kazmierczak, supra* (overruling *People v Taylor*, 454 Mich 580 (1997) after determining that the latter had misread and misapplied controlling United States Supreme Curt precedent); *People v Luckity*, 460 Mich 484 (1999) (overruling *People v Gearns*, 457 Mich 170 (1998) after determining that the *Gearns* test for harmless error conflicted with statute); *People v Graves*, 458 Mich 476 (1998) (overruling *People v Vail*, 393 Mich 460 (1975) after determining that it was erroneously decided). The rule of stare decisis is not an "inexorable command." *People v Kazmierczak, supra* at 425.

There are times when the duty of this Court is to re-examine precedent. In fact, the Court's willingness to re-examine precedent is an integral component in the development of the common law. "The common law is not immutable; rather it is flexible and adaptable to changing conditions." (Citation omitted) *Robinson v City of Detroit, supra* at 471 n 2 (Corrigan, J., concurring opinion).

Notwithstanding this obligation to review and re-examine prior decisions, this Court has recognized that overruling precedent is a "matter of great moment and consequence." *Robinson v City of Detroit, supra* at 476 (Kelly, J., concurring/dissenting opinion). In determining whether to overrule precedent, the Court must concern itself with whether there is a justification for such a significant action. In making this decision, several questions arise: Have subsequent developments in the law undermined the prior decision's rationale? Has the challenged precedent become a detriment to the consistency of the law? *Id.* Has the prior law proven unworkable?

> "Courts should also review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Robinson v City of Detroit, supra* at 464.

In applying principles of stare decisis this Court must begin by deciding whether the underlying rulings were wrongly decided. Yet, even if the answer is in the affirmative, a second tier is required to complete the analysis. The Court should not automatically overrule even erroneous precedent without considering the ultimate effects of such an action. *Id* at 465-466. The Court must examine the effect on "reliance interest" and whether overruling would work an "undue hardship" because of that reliance. *Id.*

The question in such instances is whether the previous decisions have become "so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just

readjustments, but practical real-world dislocations." *Id.* The Court should only overrule precedent where a determination is made that "less mischief will result from overruling the case rather than following it * * *." *People v Graves*, *supra* at 480.

In the instant matter, even if Defendant were to advance the proposition that the federal subjective entrapment test is "better" than, or "preferential" to, the existing state objective analysis, Defendant cannot make a well-reasoned or intellectually honest argument that Michigan law should be abandoned or overruled under the principles outlines above. As will be contended, *infra*, and as has been asserted by Appellant and by Amicus, the prior rulings of this Court which recognized and developed the law of entrapment were well-reasoned. They were not erroneously decided, nor does the existing law conflict with any statutory provisions or with state or federal constitutional constraints.

The rationale for the existence of the entrapment defense has not been undermined by any recent developments in the law, nor has it proven an unworkable theory. As has been noted by Appellant, all indications are that the existing standard has not presented application difficulties in the trial courts and has proven to be a "fair and workable test" (Appellant's Brief at 34). There is no reason to abandon the objective test for entrapment.

B. <u>Legal Foundation</u>

Appellant and Amicus, while agreeing that this Court ought to adhere to the objective entrapment analysis, also suggest - as Justice Corrigan argued in *Maffett, supra* - that the defense of entrapment ought to be abrogated as it lacks a legitimate legal foundation. These parties contend that there is no statutory nor constitutional basis for the entrapment defense, and as such, that the judiciary lacks any authority to tread in this area. Defendant disagrees and believes that there are

several alternative theories which support this Court's further review of entrapment as a valid defense.[4]

1. The Common Law

The validity of common-law legal principles is well recognized. The legitimacy of these non-statutory, non-constitutional principles was recognized in the development of the Michigan Constitution, which provides in relevant part:

> "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, §7.

This provision clearly recognizes the integral part which the principles of the common-law play in the system of American jurisprudence. Much of society's conduct is regulated by developments at common-law. The common-law has always included the development of substantive crimes, civil causes of action, and criminal and civil defenses, and the defense of entrapment should be recognized as a valid common-law defense. The theory underlying entrapment is not of recent evolution. Although it has necessarily changed over the years, the defense of entrapment developed under principles of common-law dating back to 1878, thus, it is a legitimate defense under appropriate factual circumstances. See *Saunders v People*, 38 Mich 218

---

[4] One of the criticisms leveled at the federal subjective test is that the United States Supreme Court has grounded that theory in an implied federal statutory analysis. *Sorrells v United States*, 287 US 435; 53 S Ct 210; 77 L Ed 2d 413 (1932). In *Sorrells, supra*, the Supreme Court ruled that Congress, in enacting the criminal statute at issue, could not have intended for its provisions to apply to individuals lured into criminality by the acts of law enforcement. *Id* at 451; *People v Maffett, supra* at 882 (Corrigan, J., dissenting). The Court concluded that to permit a conviction under such circumstances would run contrary to the spirit of the law, and thus, the entrapment defense was viable. That justification has never been adopted by this Court.

(1878) (generally recognized as the earliest case in the United States to originate the concept of entrapment, wherein the Michigan Supreme Court condemned the police conduct therein as "reprehensible"); see also *O'Brien v State*, 6 Tex App 665 (1879). It would entirely negate the intent of the constitutional provision referenced above, to assert that while substantive crimes may be defined by common law, that respective defenses cannot.

This Court has affirmed the use of the common-law to define prohibited conduct in both civil and criminal arenas. See, for example *Ireland v Edwards*, 230 Mich App 607, 614 (1998) (elements of civil cause of action for libel defined by common-law); *People v Kevorkian*, 447 Mich 436 (1994) (recognizing crime of assisted suicide as common law offense).

In *Kevorkian, supra*, this Court reviewed the defendant's convictions for murder where the underlying facts indicated that he had assisted in several suicides. Defendant's actions occurred prior to the adoption of Michigan's assisted suicide statute and thus, the lower court granted the defendant's motion to quash finding that the prosecution had failed to establish the elements necessary to a charge of open murder. In remanding the case to the trial court, this Court recognized that although the act of murder is proscribed by statute, the definition of murder "has been left to the common law" *Id* at 488 (citations omitted). The Court further noted that the common-law applied unless it had been abrogated by the constitution, the Legislature, or the Court itself. *Id*, citing Const 1963, art 3, §7; *People v Aaron*, 409 Mich 672, 722-723 (1980).

The *Kevorkian* Court, in reviewing the common-law as it applied to the definition of murder, ruled that the definition did not include the elements of assisted suicide. *Kevorkian, supra* at 494-495. The Court noted that there was a specific distinction between "killing oneself and being killed by another" and concluded that "assisting suicide is its own species of crime." *Id at 495 n 71.*

Nonetheless, even after determining that assisted suicide was not defined as murder and that it was not specifically proscribed by statute, the Court did not affirm the trial court's dismissal of the charges against the defendant. Rather, in reliance upon common-law principles, the Court held that the defendant could be prosecuted:

> "However, even absent a statute that specifically proscribes assisted suicide, prosecution and punishment for assisting in a suicide would not be precluded. Rather, such conduct may be prosecuted as a separate common-law offense under the saving clause of MCL §750.505; MSA §28.773:
>
> > Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court." (Footnote omitted) *Id* at 495.

This savings clause as been relied upon in other instances to validate the creation of numerous substantive criminal offenses under common-law principles. See also, for example, *People v Cunningham*, 201 Mich App 720 (1993) (recognizing common-law offense of accessory after the fact); *People v Coutu*, 235 Mich App 695, *lv denied*, 461 Mich 945 (1999) (recognizing official misconduct in office as common-law offense); *People v Lewis*, 20 Mich App 653 (1969) (recognizing rioting and inciting to riot as common-law offenses); *People v Vallance*, 216 Mich App 415 (1996) (recognizing obstruction of justice may be prosecuted as a common-law offense). And, there is no question that existing common-law principles may be altered as necessary by the judiciary. *Robinson v City of Detroit, supra* at 471 n2 (Corrigan, J., concurring opinion).

Thus, where this Court has historically approved the creation of substantive criminal charges under the common-law, and has recognized various civil causes of action under those principles, it

follows that defenses which existed prior to the adoption of the Michigan Constitution must also be recognized as legitimate exercises of common-law principles.

Further, this Court appears to have accepted the principle that the objective test is "properly rooted in a form of judicially developed common law based upon the courts' 'supervisory jurisdiction over the administration of criminal justice.' [*Sherman v United States*, 356 US 369, 381; 78 S Ct 819; 2 L Ed 2d 848 (1958)]." *People v Juillet*, 439 Mich 34, 84 (1991) (Cavanagh, J., concurring opinion). This theory emanates with the concept that the objective standard is concerned with discouraging law enforcement activity that may not rise to the level of unconstitutionality. *Id.* This latter standard, as was noted by Justice Cavanagh, inherently includes the proposition that the Legislature could abolish the defense by statute. However, statutory abrogation is not permitted where, as here, the principle of entrapment is also grounded in constitutional theories of due process.

2. Due Process

The prohibition on entrapment is a function of constitutional due process. *Id* at 84; see also *People v Turner*, 390 Mich 7, 19 *quoting United States v Chisum*, 312 F Supp 1307, 1312 (CD Cal 1970):

> "'Entrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process. Entrapment is an affront to the basic concepts of justice. Where it exists, law enforcement techniques become contrary to the established law of the land as an impairment to due process.'
>
> 'In an attempt to discourage these practices and uphold 'public confidence in the fair and honorable administration of justice' [*Sherman v United States, supra*, 356 US 380 (Frankfurter, J.)], courts refuse to allow convictions based on entrapment.'"

Justice Cavanagh correctly observed that the entrapment doctrine, as applied through the objective test, is "properly rooted in the Due Process Clause of the Michigan Constitution. See Const 1963, art 1, §17." *People v Juillet, supra* at 85 (Cavanagh, J., concurring opinion) (footnote omitted). Defendant cannot think of a more likely validation for the existence of an entrapment defense. The due process clause has long been recognized as the appropriate vehicle for guaranteeing the protection of individual citizens from the abuses of government power. See *Rochin v California*, 342 US 165, 172; 72 S Ct 205; 96 L Ed 183 (1952) (forcible extraction of stomach contents violated defendant's due process rights). The United States Supreme Court has likewise recognized that constitutional standards might be applicable to reprehensible police conduct. See *United States v Russell*, 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973); *Hampton v United States*, 425 US 484, 491-495; 96 S Ct 1646; 48 L Ed 2d 113 (1976) (Powell, J., concurring opinion); see also *People v Jamieson, supra* at 98 n 1 (Griffin, J., dissenting, but recognizing and listing numerous lower federal court opinions that have recognized the viability of the due process defense). Thus, constitutional theory provides a rational alternative to the common-law theory validating the defense of entrapment.

C. Reprehensible Conduct

Appellant has concluded that this Court ought to adhere to the objective test for entrapment, but qualifies that conclusion by contending that the Court ought to delete any references to "reprehensible conduct." Appellant contends that this represents a better approach to the objective analysis because "Government conduct which impermissibly manufactures and instigates criminal conduct by an innocent person is reprehensible." (Appellant's Brief at 37). Amicus has similarly concluded that the objective test is the appropriate analysis for claims of entrapment, but also

contends that the "reprehensible conduct" prong be deleted. Amicus contends that permitting the dismissal of charges on the basis of a determination of reprehensible conduct "will overstep the separation of power between the judiciary and the executive, and allow the judicial branch to become a super law enforcement agency, passing subjective judgements upon a particular law enforcement strategy used in a given case." (Amicus' Brief at 25).

Defendant agrees that the objective test for entrapment is the appropriate framework for analyzing claims of entrapment, but disagrees that references to reprehensible conduct should be deleted. Defendant further disagrees that invalidating convictions based on determinations of reprehensible conduct is beyond the authority of the judiciary. To accept the assertion that outrageous government conduct cannot form the basis of an entrapment test would essentially turn the objective test - focusing primarily on the government conduct - into a subjective test - focusing primarily on the defendant's predisposition to commit the crime charged.

The concept of "reprehensible" police conduct is not a term of any recent origin. Contrary to Amicus' contention, this focus on government conduct was not created by the *Juillet* Court in 1991. The term "reprehensible" was first used to describe unacceptable police conduct over one hundred years ago in *Saunders v People, supra*. There, in various concurring opinions, justices described the conduct therein as "indefensible," and as "scandalous and reprehensible." *Id* at 221-222, 223.

The focus on the conduct of law enforcement is at the very essence of the entrapment analysis. The underlying rationale tied to the development of the defense of entrapment was a desire to prevent unlawful government activity in instigating criminal activity. *People v Jamieson, supra* at 68. The purpose of the entrapment defense has long been a desire to deter the "corruptive use of

governmental authority * * *." *People v Juillet, supra* at 52; *People v Turner, supra* at 20, *quoting United States v Russell, supra* (Stewart, J., dissenting opinion).

In *Turner,* this Court quoted the dissenting opinion of Justice Stewart to express its adoption of the objective test for entrapment. This language specifically identified its focus as the prevention of objectionable police conduct. Justice Stewart, as did this Court, opted for the objective test based, in part, on the realization that the it would be misleading to focus on the "otherwise innocent" character of the accused. Justice Stewart noted the reality that the mere fact that the charged defendant has committed an act defined as illegal demonstrates that he is not innocent of the crime charged. Thus, Justice Stewart found that the "significant focus must be on the conduct of the government agents * * ." *People v Turner, supra* at 20, *quoting United States v Russell, supra.* Justice Stewart set forth the following rule:

> "But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit, then -- regardless of the character or propensities of the particular person induced -- I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice" *Id.*

The *Turner* Court adopted this test finding that the alternative subjective test "fails to focus on the real concern in these cases -- whether the actions of the police were so *reprehensible* under the circumstances, that the Court should refuse , as a matter of public policy, to permit a conviction to stand." *Id* at 22 (Emphasis added).

Thus, as originally adopted, the objective test looked *only* to the conduct of law enforcement, and eliminated any review of the defendant's predisposition to criminal conduct. The focus was the

conduct of the government officials. It was of no matter whether that conduct was defined as "reprehensible" or ""indefensible" or "scandalous." Regardless of the label pasted on the conduct, it was that *conduct* which formed the basis of the objective test of entrapment. While Amicus believes that the more recent use of the term "reprehensible" has broadened the impact of the entrapment defense, Defendant believes that recent changes in the description of entrapment have merely qualified the application of the objective test.

In *Turner,* this Court adopted Justice Stewart's map for the application of the objective test. Subsequently, this Court has fine-tuned that test to deal with the changing circumstances which have come before the Court. Certainly, views of which conduct is defined as "reprehensible" have changed over time, but that is the nature of the objective test. It strives for an objective read of conduct. And, certainly, as the world changes, the objective labels placed upon conduct will change. What was reprehensible by societal standards in 1878, may not be upsetting in the least in the year 2002. At the same time, one might assume that conduct which shocks us in 2002, might be somehow acceptable in 2102. The fact that the beliefs of our society will change with the passage of time should not be the basis for deleting the "reprehensible" conduct prong of the objective test. That conduct is the very key to the objective test.

The change in the objective test for entrapment was not that this Court *added* a reprehensible conduct prong. That prong always existed - it is the very place that we began - a determination that regardless of the characteristics of a given defendant, that certain police behavior was unacceptable. *People v Turner, supra* at 18-21, 22 (noting the focus is on the reprehensible conduct of the police); *United States v Russell,* 411 US at 437 (Douglas, J., dissenting opinion); *Sherman v United States,*

356 US at 382-383 (Frankfurter, J., concurring opinion). To abandon the focus of the objective test would essentially equate with an abandonment of the objective theory itself.

The evolution of the objective test resulted from Justice Brickley's recognition in *Jamieson*, that the objective and subjective tests overlap in many ways. It was as a result of this evaluation, that this Court approved shifting some attention on to the defendant's particular circumstances. Justice Brickley stated:

> "As a matter of practicality, in many instances the application of the two theories overlap. When applying the subjective test, to determine if the accused is predisposed, the court must consider the official's conduct. Predisposition is linked to the amount of inducement and pressure offered by an agent as well as how long the agent persisted before the commission of the illegal act. Similarly, courts applying the objective approach use the state of mind of the accused as a factor. When applying the objective test, consideration is given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances. Under either approach, courts adhere to the fact that the function of law enforcement is to deter crime and not to manufacture it." *People v Jamieson, supra* at 74.

This statement accepted the principle that while conduct might itself appear on its face to be unacceptable under the objective test, that the conduct should not be viewed in a vacuum. Instead, police conduct should be viewed with an eye to the circumstances of the individual charged defendant.

In the year following *Jamieson*, the Court further qualified this comment in *People v Juillet, supra*. There, in another decision involving several concurring opinions, the members of this Court maintained a commitment to the objective test. The split in the opinions came primarily as the result of the belief of some members of the Court that the character and circumstances of the charged

defendant should not be considered as part of the objective analysis - which is arguably the purer form of the objective test.

In the lead opinion, Justice Brickley, joined by Justices Riley and Griffin adhered to the objective test, but expanded upon the idea that the characteristics of the individual defendant were pertinent to an entrapment analysis. Justice Cavanagh, joined by Justices Levin and Mallett, agreed that an objective test was preferable, but believed that it ought to exist without reference to the defendant's character. Justice Cavanagh added that in his opinion, there may be occasions where police conduct is so unacceptable that a conviction must not be permitted even without establishing causation - that is what he defined as the "broader 'reprehensible conduct' prong." *Id* at 77-78. Justice Boyle wrote separately to indicate that she believed a subjective test to be the appropriate tool for the analysis of entrapment claims, but nonetheless, aligned herself with Justice Brickley, adding that there may be circumstances where "reprehensible" conduct alone would suffice to establish entrapment *Id* at 87, 93-94. Justice Griffin wrote to express that while he concurred with Justice Brickley, he continued to believe that an entrapment defense only existed where the improper police activity rose to the level of a constitutional due process violation.

In reviewing these various opinions, there appears to be agreement that the objective test in Michigan permits references to a defendant's particular circumstances:

> "The trial court is entitled to consider the circumstances in which the defendant was situated in relation to the particular criminal charge brought by the prosecution. The court shall consider the effects of the police conduct upon a normally law-abiding person in the circumstances presented to the defendant, including potential vulnerability." *People v Juillet, supra* at 55 (Brickley, J.).

Thus, the *Jamieson* and *Juillet* Courts did not simply add a new prong to the entrapment test. Instead, the Court bifurcated the objective test. First, a majority of the Court qualified the objective test to permit reference to a defendant's personal circumstances. Secondly, a separate majority recognized that there might be circumstances which would justify dismissal of criminal charges under a pure objective test - a test that gives no regard to the characteristics of the defendant. *See, Juillet, supra* (Cavanagh, CJ., Levin and Mallett, JJ., concurring; Boyle, J., concurring; Griffin, J., concurring) And, there is no basis for this Court to delete that latter prohibition.

The prohibition against truly "reprehensible" conduct is most directly tied to concerns of constitutional due process.[5] Thus, even if this Court concludes that the entrapment defense as it has evolved is not constitutionally based, there is certainly support for the assertion that should the government conduct reaches a certain level of "outrageousness," that the due process clauses of the state and federal constitutions are implicated. See *Juillet, supra* at 76-79, 93-94, 110 (separate opinions of Justices Cavanagh, Griffin and Boyle); *United States v Russell,* 411 US at 431-432;

---

[5] This Court has had other opportunities to review somewhat analogous situations relating to trial errors. In the case of evidentiary errors which are generally subject to harmless error review, this Court has noted that there are times when error is so outrageous or so offensive to ideas of fairness that it must be deemed reversible without regard to harmless error principles:

> "'Where it is claimed that error is harmless, two inquiries are pertinent. First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? See *People v. Bigge* (1939), 288 Mich 417, 421; *People v. Berry* (1968), 10 Mich App 469, 474; *People v. Mosley* (1953), 338 Mich 559, 566. See, also, *Chapman v. California* (1967), 386 US 18, 23, 24 (87 S Ct 824, 17 L Ed 2d 705), rehearing denied 386 US 987 (87 S Ct 1283, 18 L Ed 2d 241).'" *People v Robinson*, 386 Mich 551 (1972). at 563, *citing People v Wichman*, 15 Mich App 110, 116 (1968).

Hampton v United States, 42 US at 488-490, 495, 497. In such instances, because the defense is clearly grounded in the constitution, this Court cannot abrogate its existence.

D. Conclusion

Appellant and Amicus assert that they favor the objective test, but their arguments seem to encourage the adoption of something far more subjective. Both parties contend that no case should be dismissed on the basis of government conduct alone - no matter how indefensible or reprehensible. This appears to be a rejection of the pure objective test - the test most closely tied to constitutional due process prohibitions. Defendant disagrees with this potential shift in entrapment analysis.

Although the objective theory of entrapment analysis has evolved over time, it is still a valid basis upon which to review claims of improper police conduct. There is no legal basis to overrule existing caselaw. The evolution of entrapment law in *Jamieson* and in *Juillet* was entirely consistent with precedent:

> "[Justice Brickley's] opinion in [*People v Jamieson*], represented a logical development in entrapment law, faithful to our precedents, and Justice Brickley's analysis in this instant cases [*People v Juillet*], *whatever its problems, is perfectly consistent with his Jamieson* analysis." *People v Juillet, supra* at 70 (Cavanagh, J., concurring).

Existing precedent adequately protects individuals suspected of criminal behavior from improper police conduct, and alternatively permits the use of investigatory techniques that might provide the opportunity for crime. This Court ought to again affirm a commitment to the objective test of entrapment. As was the case in *Jamieson* some twelve years ago, "there is not sufficient justification or need to change a well-settled principle of law in this state." The objective test has proven a workable analysis and ought to be maintained.

II. THE LOWER COURTS PROPERLY RULED THAT DEFENDANT WAS ENTRAPPED.

The facts of the instant case establish that Defendant did, in fact, meet his burden of establishing by a preponderance of the evidence that he was illegally entrapped into committing the charged offenses. *People v D'Angelo,* 401 Mich 167 (1977). The testimony established that the police engaged in sufficiently reprehensible conduct to constitute entrapment regardless of whether that conduct caused the offenses to occur, and additionally, that the police conduct was sufficient to induce the commission of the offenses by a person similarly situated to Jessie Johnson.

Defendant recognizes that the mere fact that a police officer or agent provides drugs to a suspect does not *per se* require a finding of entrapment as a matter of law. See *People v Butler,* 444 Mich 965 (1994), *reversing* 199 Mich App 474 (1993). However, the situation in *Butler,* for example, was very different than that presented in the instant case. In *Butler*, a police officer acting undercover made it generally known on the streets that he had cocaine for sale. He was then affirmatively contacted by one of the defendants, who sought to purchase drugs from the officer. Even though no actual transaction occurred, the defendants were eventually arrested and convicted of conspiracy. While the Court of Appeals found the police conduct sufficiently reprehensible to constitute entrapment, the Supreme Court disagreed, holding that undercover drug sales by the police are not *per se* entrapment, and that this scenario was nothing more than the police presenting the defendants an opportunity to commit the crime.

Similarly, in *People v Connolly,* 232 Mich App 425 (1998), the police, acting initially through an informant, engaged in negotiations with the defendants concerning a possible drug

sale. During the course of the negotiations, the police twice provided the defendants with small samples of the type of marijuana which was to be delivered. The Court of Appeals overruled the trial court's finding of entrapment, holding the police are justified in "distribut[ing] controlled substances to another person as a means of detecting criminal activity." *Id* at 431. The Court noted that if this conduct was construed to be entrapment, buyers of drugs would always insist upon a small sample first before taking delivery of the larger amount to insure themselves against the potential they were in fact dealing with undercover officers. The Court noted that "had the police engaged in the distribution of a substantial quantity of the marijuana intended as bait in the sting operation, we would be inclined to say the police intended `to commit certain criminal, dangerous, or immoral act,' which could not be tolerated," the Court found the actions in *Connolly* were not so reprehensible to require dismissal of the charges.

The situation in the case at bar was substantially different than those presented in either *Connolly* or *Butler*. In this matter, there was no testimony presented at the entrapment hearing that the police suspected Defendant of being involved in drug trafficking prior to Flack's accusations. It was Flack - who admittedly was indebted to Defendant (for drugs or, perhaps, for rent) - who accused Defendant of providing a safe place for drug sales. Unlike the defendant in *Butler*, there was no evidence in this case that Defendant had come forward and offered his services to provide protection or to provide other "safe" sales points to anyone known to him as a drug dealer. There was no evidence that Jessie Johnson had any relationship with any drug supplier or that he was himself a supplier of narcotics. Nor was there any evidence that he used narcotics or that he ever had them in his possession. Prior to the police activity herein, there was no evidence that he had ever acted as a "body guard" for drug traffickers in other situations. This

was not a case of the police merely providing an opportunity to someone already known to them as engaged in or willing to commit the charged offenses, but rather the creation of both the motive for and the commission of an offense that arguably would not have occurred but for the police conduct.

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." *Sherman v United States*, 356 US at 376 (1958). (Footnotes omitted).

In this case, the police created the situation that gave rise to a motive, both financial and protective, for Defendant to engage in drug possession. Prior to the police "set up" in this matter, there was not one bit of evidence that Defendant had ever been directly involved in drug trafficking. Not one witness had ever seen him handle drugs, nor did anyone testify that he had ever been in any proximity to narcotics. The only evidence of Defendant's knowledge of ongoing drug trafficking was the statement of Lemeul Flack that Flack paid Defendant to look the other way. That sort of "outside" involvement hardly rises to the same level of culpability as does standing guard over drug transfers and obtaining physical control of narcotics.

It was reprehensible for a police agent to escalate Defendant's conduct. This was not a case in which there is any evidence that Defendant was ever involved the sort of behavior for which he was later involved with the police. The police escalated other - perhaps otherwise illegal behavior -

to a higher level in order to convict Defendant in this matter. This form of escalation is nonetheless entrapment. See *Juillet supra* (escalation of one form of criminal conduct to a higher degree of culpability can be entrapment).

In *Juillet,* the Court commented on the situation where a user of drugs is induced into delivery of drugs as part of the police investigation:

> "There also existed police procedures that seemed to escalate Juillet's criminal culpability. The evidence indicated that Juillet was a former and current user of drugs; however, the testimony at the hearings indicated that there was no knowledge by the police, Bleser [the informant], or anyone else on the record that Juillet was ever a drug dealer. The evidence also showed that Bleser requested Juillet to find drugs for him on numerous occasions and persuaded Juillet to set up drug transactions with other parties, himself and an undercover officer.
>
> We note that courts have found, under either the objective or the subjective test of entrapment, that when a drug user is convicted for the sale of drugs where no evidence exists that police had knowledge that the defendant was a drug dealer, the defendant was entrapped. *Shrader* [*Shrader v State*, 101 Nev 499; 706 P2d 834 (1985)], *supra; State v Soroushirn,* 571 P2d 1370 (Utah, 1977). Although only one of many factors to consider, Juillet's criminal pattern was escalated from that of use or possession of drugs to the delivery of drugs, unlike the circumstances presented in *Brown*. In this case, the police sent Bleser on a fishing expedition to find `dealers,' and the arrest of Juillet occurred when neither Bleser nor the police had any reason to believe that Juillet was actually selling drugs.
>
> * * *
>
> It also seems insignificant that Juillet knew drug dealers in the area. As noted by the prosecution and the defense, there was a general `subculture' in the area and the people in that subculture would seemingly have general knowledge of the ongoing activities and of the persons involved in those activities. Therefore, it seems clear that Juillet was not a drug dealer and that the only reason for his delivery of drugs to Bleser was the incessant requests by Bleser and

> the other activities undertaken by Bleser to induce Juillet into committing the crime." *Id* at 67-68.[6]

In the case at bar, there was no testimony presented by the prosecution that the police knew or suspected Defendant of being a drug dealer prior to Flack's contact with them. None of the police officers testified to any awareness of alleged prior drug dealings of Defendant, or as to any suspicions of them before Flack came forward with his allegations. The fact that Defendant might have been accepting favors for overlooking certain drug sales did not mean that he was an active drug dealer, nor does it mean that he could not have been entrapped.

The facts presented herein are analogous to those noted in *Juillet*. In *Juillet*, the defendant was a drug user whose involvement in the drug trade was escalated from use to sales by the conduct of the police informant. In this case, the defendant was a landlord allowing drug sales to occur on his property, whose involvement in the drug trade was escalated to possession of narcotics by the conduct of the police. This Court should follow the lead of the Supreme Court majority in *Juillet* and find such conduct reprehensible and indicative of entrapment.

The *Juillet* opinion is instructive in other regards as well. The *Juillet* Court set forth a list of factors to be considered in determining whether police conduct caused the commission of the offenses. *Id* at 56-57. Several of those factors are present in the case at bar. In this matter, the police used an informant who was a long time childhood colleague of Defendant, and the police exhibited some degree of control over that informant - continually contacting him by phone or in person to monitor his contacts with Defendant. Furthermore, the government engaged in procedures

---

[6] In *Juillet*, the majority of the Supreme Court found that Mr. Juillet was entrapped as a matter of law in his case, but that there was no entrapment in the consolidated case concerning Mr. Brown.

that escalated the criminal culpability of Defendant from accepting financial favors and looking the other way during drug transactions, to actual possession of narcotics:

> "* * * [Defendant's] role was to protect the undercover operative from rip off or arrest.
>
> Things changed again at the transaction. Immediately after the undercover officer purchased the drugs from another undercover officer, the drugs were given to Defendant to hold. The undercover officer then met the Defendant on the other side of the mall parking lot and reclaimed the drugs. While this was, in a manner, an extension of his protection duties, it also took Defendant to a completely different level of involvement.
>
> Defendant was no longer accepting money for passively allowing others to participate in drug transactions, the conduct for which he was known. He was not simply protecting a purported criminal from arrest or providing information to avoid arrest, i.e., actively permitting others to conduct drug transactions. His involvement was suddenly escalated to actively possessing the drugs. This was no longer simply a form of bribery but instead a new crime and the only crime with which he was actually charged -- possession of a controlled substance."

Defendant has established by a preponderance of the evidence that he was entrapped as a matter of law under either or both of theories set out by *Juillet.* The police conduct here was sufficiently reprehensible, standing on its own, to require reversal of the convictions and dismissal of the charges. That conduct was also sufficiently impermissible to have caused a person similarly situated to Defendant to engage in criminal behavior that he otherwise would not have committed. This Court should find no clear error in the trial court's decision nor in the Court of Appeals' opinion which affirmed that ruling.

The Court of Appeals correctly stated the applicable law and appropriately applied that law to the facts presented herein. The fact that the dissenting judge did not agree with the specific

conclusions drawn by the majority, does not mean that the trial court ruling was clearly erroneous. Likewise, this Court ought not to disturb that ruling.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Honorable Court affirm the ruling of the Michigan Court of Appeals.

Respectfully submitted,

ROBYN B. FRANKEL (P43629)
Attorney for Defendant-Appellee
39520 Woodward, Suite 230
Bloomfield Hills, Michigan 48304
(248) 645-1400

Dated: April 1, 2002.